

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLEN E. MANNING)	
Claimant)	
VS.)	
)	
GOODYEAR TIRE AND RUBBER COMPANY)	
Respondent)	Docket No. 259,253
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the November 1, 2002 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. On May 6, 2003, the Appeals Board (Board), with Gary Peterson being appointed Board Member Pro Tem and participating as same, heard oral argument.

APPEARANCES

Robert E. Tilton of Topeka, Kansas, appeared on behalf of claimant. John A. Bausch of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award. Furthermore, the parties agreed during oral argument to the Board that the court ordered independent medical reports by Dr. Peter V. Bieri dated April 1, 2002, and December 31,

2001, are part of the record. Also, the parties entered into a Stipulation which was filed August 30, 2002, concerning the claimant's average weekly wage.

ISSUES

In the Award entered November 1, 2002, Judge Avery awarded claimant compensation based upon a permanent total disability. Respondent argues claimant is capable of working and, therefore, is not entitled to an award based upon a permanent total disability. Respondent further contends that claimant is entitled to an award based upon a work disability but because claimant has not made a good faith effort to find employment a wage should be imputed. The nature and extent of claimant's disability, including whether claimant is permanently and totally disabled, is respondent's only issue for determination by the Board. Claimant contends the ALJ's Award should be affirmed but requests approval of his attorney's fees.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds that the permanent total disability award entered by the ALJ should be affirmed. The Board adopts the findings of fact and conclusions of law set forth in the ALJ's Award.

Permanent total disability exists when an employee, on account of his or her work related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.¹

An injured worker is permanently and totally disabled when he is "essentially and realistically unemployable."² The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore, it is the responsibility of the trier of fact to determine the existence, extent and duration of the injured worker's incapacity.³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.⁴

The Board finds claimant to be permanently and totally disabled due to the combination of his work-related injury and his preexisting conditions. Once claimant's

¹ K.S.A. 44-510c(a)(2).

² *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

current work-related injury resulted in his being given permanent restrictions, his available labor market dwindled to almost nothing. Taking into consideration his education, experience and capacity for retraining, claimant is realistically unemployable.

Award

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated November 1, 2002 should be, and is hereby, affirmed.

Claimant's contract with his attorney is approved as provided by K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award.

IT IS SO ORDERED.

Dated this _____ day of May 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Tilton, Attorney for Claimant
John A. Bausch, Attorney for Respondent and Liberty Mutual Insurance
Brad A. Avery, Administrative Law Judge
Director, Workers Compensation Director